

1 MORGAN, LEWIS & BOCKIUS LLP  
2 JOHN S. BATTENFELD, SBN 119513  
3 JILL A. PORCARO, SBN 190412  
4 300 South Grand Avenue  
5 Twenty-Second Floor  
6 Los Angeles, CA 90071-3132  
7 Tel: 213.612.2500  
8 Fax: 213.612.2501  
9 email: [jbattenfeld@morganlewis.com](mailto:jbattenfeld@morganlewis.com)  
10 email: [jporcaro@morganlewis.com](mailto:jporcaro@morganlewis.com)

11 MORGAN, LEWIS & BOCKIUS LLP  
12 JENNIFER WHITE-SPERLING, SBN 166504  
13 5 Park Plaza, Suite 1750  
14 Irvine, CA 92614  
15 Tel: 949.399.7000  
16 Fax: 949.399.7001  
17 email: [jwhite-sperling@morganlewis.com](mailto:jwhite-sperling@morganlewis.com)

18 Attorneys for Defendants New York Life Insurance  
19 Company and New York Life Insurance and  
20 Annuity Corporation

21 UNITED STATES DISTRICT COURT  
22 NORTHERN DISTRICT OF CALIFORNIA

23 OLGA ORTMANN, as an individual  
24 and on behalf of all others similarly  
25 situated,

26 Plaintiff,

27 v.

28 NEW YORK LIFE INSURANCE  
COMPANY, a corporation; NEW  
YORK LIFE INSURANCE AND  
ANNUITY CORPORATION, a  
corporation; and DOES 1 through 20,  
inclusive,

Defendants.

Case No. 3:07-CV-02506-WHA

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION TO  
STRIKE**

**[FED. R. CIV. PROC. 12(f)]**

Judge: Hon. William Alsup  
Date: July 5, 2007  
Time: 8:00 a.m.  
Courtroom: 9, 19th Floor

1 **I. INTRODUCTION**

2 In this putative wage and hour class action, Plaintiff Olga Ortmann  
 3 ("Plaintiff") alleges that she was employed as an "insurance agent" for Defendants  
 4 New York Life Insurance Company and New York Life Insurance and Annuity  
 5 Corporation ("Defendants"). (Complaint, ¶ 11.) In her second, third, and fourth  
 6 causes of action, all of which allege violations of various provisions of the  
 7 California Labor Code, Plaintiff seeks punitive and exemplary damages. As  
 8 punitive damages are not an available remedy for these alleged violations of the  
 9 Labor Code, these references to punitive damages should be stricken from the  
 10 Complaint. In these same causes of action under the Labor Code, Plaintiff alleges  
 11 that there is a four year statute of limitations when, in fact, a three year statute of  
 12 limitations applies. These improper references to a four year statute of limitations  
 13 should also be stricken.

14 In addition, in her fifth cause of action, Plaintiff seeks to recover civil  
 15 penalties pursuant to California Labor Code § 558. As there is no private right of  
 16 action under Labor Code § 558, this claim for relief should be stricken. Finally, in  
 17 Plaintiff's twelfth cause of action under California's Unfair Competition Law  
 18 ("UCL"), Plaintiff requests that Defendants be ordered to disgorge their profits.  
 19 Since restitution is the only monetary remedy available under the UCL, the request  
 20 for disgorgement of profits should be stricken.

21 **II. LEGAL ARGUMENT**

22 **A. Plaintiff Cannot Seek The Recovery Of Punitive Damages In The**  
 23 **Second, Third, And Fourth Causes of Action Which Are Based On**  
 24 **Violations Of The California Labor Code.**

25 In her second cause of action for failure to pay minimum wages under  
 26 Section 1194 of the California Labor Code, third cause of action for failure to  
 27 overtime under Section 1194 of the Labor Code, and fourth cause of action for  
 28 failure to indemnify for expenses and losses and illegal deductions from wages  
 under Labor Code §§ 226 and 2802, Plaintiff seeks the recovery of punitive and

1 exemplary damages. (Complaint, ¶¶ 29, 36, 43). Punitive damages are not an  
2 available remedy for these causes of action.

3 Where a statute creates new rights and obligations not previously existing in  
4 the common law, the express statutory remedy is deemed to be the exclusive  
5 remedy available for statutory violations, unless the remedies are inadequate.  
6 *Turnbull & Turnbull v. ARA Transportation Inc.*, 219 Cal. App. 3d 811 (1990); *De*  
7 *Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile*  
8 *Estates*, 94 Cal. App. 4th 890, 912 (2001). The claims that Plaintiff bring under the  
9 Labor Code—based on the obligations to pay minimum wage, to pay overtime, to  
10 provide accurate wage statements, to indemnify and reimburse for business  
11 expenses—did not exist at common law, but rather are liabilities created by statute.  
12 See *Aubry v. Goldhor*, 201 Cal. App. 3d 399, 404 (1988).<sup>1</sup>

13 The Legislature has established a comprehensive set of rights and remedies  
14 governing the compensation of workers in California in the Labor Code. In so  
15 doing, the Legislature set forth the remedies, including civil and criminal penalties,  
16 that it deemed appropriate for violations of various provisions of the Labor Code.  
17 For example, Plaintiff can seek, and is seeking, the penalty of liquidated damages  
18 for failure to pay minimum wage under Labor Code § 1194.2, waiting time  
19 penalties under Labor Code § 203 for the failure to timely pay wages, and penalties  
20 for failure to provide accurate wage statements under Labor Code § 226. In  
21 addition, the Labor Code sets forth a comprehensive scheme of criminal and civil  
22 enforcement, which is augmented by the Labor Code Private Attorneys General Act  
23 of 2004, Labor Code § 2698 *et seq.* By setting forth specific penalty provisions  
24 throughout the Labor Code, it can be inferred that the Legislature intended to  
25 exclude other remedies. Indeed, Plaintiff expressly seeks penalties under each of  
26 her second, third and fourth causes of action. See Complaint ¶¶ 30, 37, 44.

27  
28 <sup>1</sup> Superseded by statute on other grounds, as stated in: *Bell v. Farmers Ins. Exchange* 135 Cal.  
App. 4th 1138, 1147-1148 (2006)

1 Consequently, the statutory remedies set forth in the California Labor Code are the  
 2 exclusive remedies for the causes of action brought by Plaintiff under the Labor  
 3 Code.

4 The “Legislature intend[s that] the statutory penalty set forth in [a statute] . . .  
 5 be the exclusive penalty in a suit to enforce the provisions of [that statute].” *De*  
 6 *Anza*, 94 Cal. App. 4th at 912. This interpretation comports with the due process  
 7 requirement that employers have fair notice of the penalty available for particular  
 8 conduct. *Id.* at 912 (*citing BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574  
 9 (1996)) (“Elementary notions of fairness enshrined in our constitutional  
 10 jurisprudence dictate that a person receive fair notice not only of the conduct that  
 11 will subject him [or her] to punishment but also of the severity of the penalty that a  
 12 State may impose.”). This interpretation also avoids the possibility of double  
 13 penalties for the same conduct. As *De Anza* held, “a plaintiff cannot recover both  
 14 punitive damages and statutory penalties, as this would constitute a prohibited  
 15 double penalty for the same act.” *Id.* Here, Plaintiff seeks penalties under Labor  
 16 Code §§ 203, 226 and 558 in her second, third, and fourth causes of action (*see*  
 17 Complaint, ¶¶ 30, 37, 44), in addition to punitive damages, for the very same  
 18 alleged Labor Code violations.

19 Federal courts have specifically applied the exclusive remedy doctrine to the  
 20 Labor Code. In *Green v. Party City Corporation*, 2002 U.S. Dist. LEXIS 7750  
 21 (C.D. Cal. Apr. 9, 2002), the plaintiff alleged three causes of action for overtime  
 22 compensation: 1) violation of Labor Code section 1194, 2) violation of the UCL,  
 23 and 3) conversion. *Id.* at \*1. The plaintiff also sought punitive damages. *Id.* at  
 24 \*14. The court held that “the duty to pay overtime is a duty created by statute  
 25 rather than one that existed at common law” and “the Labor Code provides a  
 26 detailed remedial scheme for violation of its provisions.” *Id.* at \*13-14. As such,  
 27 the “plaintiff [could] not advance a claim for punitive damages.” *Id.* at 15.

28 Similarly, in *Czechowski v. Tandy Corp.*, 731 F. Supp. 406, 410 (N.D. Cal. 1990),

the plaintiffs alleged various violations of the Labor Code and sought both penalties and punitive damages. The court held that “[t]he Legislature’s provision of such statutory penalties preclude[d] an award of punitive damages.” *Id.* at 410. Most recently, in *Oprychal v. New York Life Ins. Co.*, Case No. CV 07-518 VBF, pg. 2 (C.D. Cal. April 13, 2007),<sup>2</sup> the District Court granted Defendants’ motion to strike the plaintiff’s request for punitive damages for similar violations of various provisions of the California Labor Code, finding that the plaintiff’s “requests for punitive damages are completely without support in statutory or case law.”<sup>3</sup>

Like the plaintiffs in *Green*, *Czechowski*, and *Oprychal*, Plaintiff here impermissibly seeks punitive damages for her Labor Code claims. Like the courts in *Green*, *Czechowski*, and *Oprychal*, this Court should hold that punitive damages are not recoverable because the statutory remedies provided for in the Labor Code are exclusive and do not permit the recovery of punitive damages. All references to the recovery of punitive damages should be stricken from the second, third, and fourth causes of action.

**B. A Four-Year Statute of Limitations Does Not Apply To Plaintiff’s Second, Third, And Fourth Causes Of Action Under The California Labor Code.**

In her second cause of action for failure to pay minimum wages, third cause of action for failure to pay overtime, and fourth cause of action for alleged unlawful deductions Plaintiff alleges that a four year statute of limitations applies. (Complaint, ¶¶ 27, 34, 41). These allegations should be stricken as a four year statute of limitation does not apply to these claims.

Specifically, in her second and third causes of action, Plaintiff claims that Defendants violated Labor Code § 1194 which provides, in relevant part, that “an employee receiving less than the legal minimum wage or the legal overtime

<sup>2</sup> Attached hereto as Exhibit A.

<sup>3</sup> Defendants are concurrently moving to dismiss, stay, or transfer the present action given the pendency of the *Oprychal* issue, under the “first-to-file” rule.



1 compensation . . . is entitled to recover in a civil action the unpaid balance of the  
 2 full amount of this minimum wage or overtime compensation.” Labor Code  
 3 § 1194. A three-year statute of limitations governs claims brought pursuant to  
 4 Labor Code § 1194. *See Aubry v. Goldhor*, 201 Cal. App. 3d 399, 404 (1988) (“the  
 5 three-year statute of limitations governs . . . the cause of action for unpaid overtime  
 6 compensation”); *Janik v. Rudy, Exelrod & Zieff*, 119 Cal. App. 4th 930, 934 (2004)  
 7 (a three-year statute of limitations applied to a Labor Code § 1194 claim).  
 8 Paragraphs 27 and 34 of the Complaint, which allege that Plaintiff is entitled to  
 9 recover minimum wages and overtime for hours worked during the four years  
 10 preceding the filing of the Complaint, should therefore be stricken.

11 In addition, in her fourth cause of action, Plaintiff claims that Defendants  
 12 violated Labor Code § 2802 because allegedly they did not indemnify or reimburse  
 13 Plaintiff for all expenditures or losses incurred in direct consequence of the  
 14 discharge of her duties. A claim under Labor Code § 2802 is subject to the three-  
 15 year statute of limitations set forth in Code of Civil Procedure § 338(a) as a  
 16 statutory obligation. Therefore, the allegation in paragraph 41 in the fourth cause of  
 17 action which refers to four years prior to the filing of the Complaint should be  
 18 stricken.

19 C. **Plaintiff’s Request For Penalties Pursuant To Labor Code**  
 20 **§ 558 Should be Stricken Because There Is No Private Right**  
 21 **Of Action To Seek Penalties Under Section 558.**

22 In her fifth cause of action, Plaintiff alleges that she is entitled to penalties  
 23 pursuant to Labor Code § 558 for Defendants’ alleged failure to provide meal  
 24 breaks. (Complaint, ¶¶ 6, 48). Plaintiff’s request for penalties should be stricken  
 25 as there is no private right of action to seek such relief under § 558.

26 Under California law, “[a]doption of a regulatory statute does not  
 27 automatically create a private right to sue for damages resulting from violations of  
 28 the statute.” *Vikco Ins. Services, Inc. v. Ohio Indem. Co.*, 70 Cal. App. 4th 55, 62-

1 63 (1999). Rather,

2 a private right of action exists only if the language of the  
3 statute or its legislative history clearly indicates the  
4 Legislature intended to create such a right to sue for  
5 damages. If the Legislature intends to create a private  
6 cause of action, [California courts] generally assume it  
7 will do so directly in clear understandable, unmistakable  
8 terms.  
9

10 *Id.* (citations, quotations, alterations omitted).

11 Section 558 imposes various penalties for “[a]ny employer or other person  
12 acting on behalf of an employer who violates, or causes to be violated, a section of  
13 [Chapter One, Part Two of the Labor Code] or any provision regulating hours and  
14 days of work in any order of the Industrial Welfare Commission . . .”. Labor Code  
15 § 558. The plain language of § 558 does not “clearly and unmistakably give  
16 employees the right to sue under section 558.” *Ruiz v. Paladin Group, Inc.*, 2003  
17 WL 22992077, \*2 (C.D. Cal. Sept. 29, 2003).

18 The structure of Section 558 and a comparison with other provisions of the  
19 Labor Code further confirm that employees do not have a private right of action.  
20 As noted by the *Ruiz* court, “[p]art (a) provides the remedies for a violation of  
21 certain wage and hour provisions, while part (b) sets forth the procedure for  
22 enforcement of that section through the Labor Commissioner.” *Id.* at \*2 (emphasis  
23 added). Moreover, where the legislature has intended to create a private right of  
24 action, it has done so in clear and unmistakable language. *See* Labor Code § 1194  
25 (“any employee receiving less than the legal minimum wage or the legal overtime  
26 compensation . . . is entitled to recover in a civil action the unpaid balance . . .”) (emphasis added). In short, Section 558’s “comprehensive administrative scheme,  
27 together with the absence of reference to a private right of action, strongly suggests  
28

1 that the Legislature did not intend to create a private right of action . . . .” *Ruiz*,  
 2 2003 WL 22992077 at \*2. *See also Caliber Bodyworks, Inc. v. Superior Court*, 134  
 3 Cal. App. 4th 365, 377-78 (2005) (discussing “civil penalties” under the Labor  
 4 Code which were enforceable only by California’s labor law enforcement  
 5 agencies). Thus, Plaintiff’s claim for penalties pursuant to California Labor Code §  
 6 558 should be stricken.

7 **D. Plaintiff Cannot Seek Disgorgement of Profits Under The**  
 8 **UCL.**

9 Plaintiff’s twelfth cause of action is brought pursuant to the UCL. In support  
 10 of her claims, Plaintiff alleges that Defendants’ alleged violations of the Labor  
 11 Code and various other regulations, constitute “unfair and unlawful business  
 12 practices” under the UCL. (Complaint, ¶ 83). Plaintiff seeks recovery of  
 13 “disgorged profits” from the alleged unlawful business practices of Defendants.  
 14 (Complaint, ¶ 85, Prayer for Relief, ¶ 4).

15 Disgorgement of profits is not available to a private litigant under the UCL.  
 16 State and federal courts have repeatedly held that the UCL limits a private  
 17 plaintiff’s monetary remedy to restitution. *See Cortez v. Purolator Air Filtration*  
 18 *Prods. Co.*, 23 Cal. 4th 163, 176 (2000); *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950  
 19 (2002) (*quoting Cel-Tech Comms., Inc. v. L.A. Cellular Tele. Co.*, 20 Cal.4th 163,  
 20 179 (1999)); *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1146  
 21 (2003) (*quoting Kraus v. Trinity Mgm’t Serv’s Inc.*, 23 Cal. 4th 116, 129 (2000)).

22 The California Supreme Court has unequivocally held that “disgorgement . . .  
 23 is not an authorized remedy in an individual action under the UCL.” *Korea Supply*  
 24 *Co.*, 29 Cal. 4th at 1140. In *Korea Supply Co.*, the plaintiff sought the disgorgement  
 25 of profits acquired by the defendant through its allegedly unfair business practices.  
 26 *Id.* at 1142. The California Supreme Court reaffirmed the distinction that it had  
 27 previously made between disgorgement and restitution, in that “disgorgement” is a  
 28 broader remedy than restitution. *Id.* at 1144-45. The Court held that, while



1 restitution was an available remedy under the UCL, disgorgement of money  
 2 obtained through an unfair business practice is an available remedy in a  
 3 representative and an individual UCL action *only to the extent that it constitutes*  
 4 *restitution*. *Id.* at 1145. Several courts have subsequently held that disgorgement  
 5 of profits is also not available in a class action under the UCL. *See e.g., Madrid v.*  
 6 *Perot Systems Corp.*, 130 Cal. App. 4th 440, 459, 461 (2005); *Feitelberg v. Credit*  
 7 *Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1018 (2005). As such, although  
 8 the unpaid wages and deductions may be recoverable under the UCL as restitution,  
 9 disgorged profits are not recoverable. In *Oprychal v. New York Life Ins. Co.*, Case  
 10 No. CV 07-518 VBF, the District Court granted Defendants' request to strike the  
 11 Plaintiff's request for disgorgement of profits in his UCL claim. Therefore,  
 12 Plaintiff's requests for "disgorged profits" should be stricken from her UCL claim  
 13 and the Complaint.

### 14 **III. CONCLUSION**

15 For the foregoing reasons, Defendants request that the Court grant their  
 16 motion to strike.

17 Dated: May 24, 2007

MORGAN, LEWIS & BOCKIUS LLP  
 JOHN S. BATTENFELD  
 JENNIFER WHITE-SPERLING  
 JILL A. PORCARO

20  
 21 By /s/ JILL A. PORCARO

Jill A. Porcaro  
 Attorneys for Defendants  
 New York Life Insurance Company  
 and New York Life Insurance and  
 Annuity Corporation